

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LANGLEY PARTNERS, L.P., ) No. C-05-4194 SC  
 )  
Plaintiff, ) ORDER GRANTING IN  
 ) PART AND DENYING IN  
v. ) PART DEFENDANTS'  
 ) MOTION TO DISMISS  
 )  
TRIPATH TECHNOLOGY, INC., ADYA )  
TRIPATHI AND DAVID EICHLER, )  
 )  
Defendants. )  
\_\_\_\_\_ )

**I. INTRODUCTION**

Langley Partners, L.P. ("Plaintiff") brought this action against Adya Tripathi<sup>1</sup> and David Eichler<sup>2</sup> (collectively "Individual Defendants"), Tripath Technology Inc., (collectively with Individual Defendants, "Defendants" or "Tripath"), alleging, inter alia, securities violations, fraud and breach of contract.

Presently before the Court is Tripath's motion to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6).

The Court, having reviewed the parties' submissions, hereby GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss.

**II. BACKGROUND**

The following allegations are taken from Plaintiff's papers and will be assumed as true for purposes of this Order.

---

<sup>1</sup> Tripath's Chairman, President and Chief Executive Officer. Complaint ¶ 6.

<sup>2</sup> Tripath's Chief Financial Officer until his "departure on September 15, 2004." Complaint ¶ 7.

1 Plaintiff, a Delaware limited partnership residing in New  
2 York, first filed the Complaint in the Southern District of New  
3 York.<sup>3</sup> Plaintiff's central allegation is that it "purchased  
4 Tripath securities at artificially inflated prices on August 3,  
5 2004, and has been damaged thereby." Complaint ¶ 4 ("Compl.").<sup>4</sup>

6 On August 2, 2004, the parties entered into a stock purchase  
7 agreement ("Purchase Agreement"), "pursuant to which Langley  
8 purchased 1,000,000 shares of Tripath common stock at the purchase  
9 price of \$2 per share."<sup>5</sup> Compl. ¶ 17. In deciding to purchase  
10 these securities, Plaintiff states that it "relied on [Tripath's]  
11 public filings with the Securities and Exchange Commission," its  
12 Prospectus and Prospectus Supplement, and the documents  
13 incorporated by reference. Id. ¶ 18.

14 Defendants, in a Form 10K filed on March 9, 2004 with the  
15 Securities and Exchange Commission ("SEC"), stated that in  
16 September 2003, Tripath had "announced the introduction of a new  
17 breakthrough low cost power stage architecture platform...which we  
18 call 'Godzilla' that can be used across the broad spectrum of

---

19  
20 <sup>3</sup> The Honorable Harold Baer, on a motion of Tripath,  
21 transferred this case from the Southern District of New York  
22 because four class actions arising from the facts of this case were  
23 pending in the Northern District of California. In December 2004,  
24 the Honorable Sandra B. Armstrong of the Northern District  
25 consolidated these actions. In July 2005, the parties to the class  
26 actions filed a stipulation of settlement. Plaintiff has filed a  
27 declaration stating that it properly and timely "opted out" of this  
28 settlement.

25 <sup>4</sup> Tripath is a publicly traded Delaware corporation based in  
26 San Jose, California, and designs and markets digital chips for use  
27 in consumer products. Compl. ¶ 5, Defs'. Mem. at 2.

27 <sup>5</sup> Tripath securities were trading at \$2.42 per share at the  
28 time of the signing. Compl. ¶ 17.

1 audio amplifiers." Compl. ¶ 25.

2 On October 22, 2004, Tripath announced that net revenues for  
3 the third quarter of 2004 would be well below the \$4-\$4.5 million  
4 Tripath had put forth as its "revenue expectation" in July 2004.  
5 Compl. ¶ 39. In addition, Tripath announced that it might need to  
6 restate its revenues for the second quarter of 2004 and that its  
7 auditor, BDO Seidman, had resigned on October 18 and had "issued a  
8 letter asserting material weaknesses in Tripath's internal  
9 controls concerning the effectiveness of Tripath's Audit Committee  
10 and Tripath's ability to estimate distributor sales returns in  
11 accordance with SFAS no. 48." Compl. ¶ 39. Tripath's stock fell  
12 \$0.75 per share from its closing price of \$1.52 on October 22,  
13 closing at \$0.77 per share on October 25, the next trading day.  
14 Id. ¶ 40.

15 On March 24, 2005, Defendants stated in an SEC filing, that  
16 it had "introduced our lower cost 'Godzilla' architecture products  
17 in January 2004 and began sampling them in certain customers'  
18 products in mid-2004. However, we have not received design-wins  
19 for these products to date." Id. ¶ 34.

20 Plaintiff asserts that had it "known the truth about  
21 Tripath's second quarter 2004 revenues, lack of internal controls,  
22 and lack of 'design wins' for the key 'Godzilla' product,  
23 Defendants would not have commanded anything close to the \$2 per  
24 share they conned out of Langley." Plaintiff's Memorandum in  
25 Opposition to Motion to Dismiss at 9 ("Pl's. Mem.").

26 Plaintiff alleges that Defendants (1) have violated Section  
27 10(b) and Rule 10(b)-5 of the 1934 Securities and Exchange Act

("1934 Act"), (2) have incurred liability as control persons under Section 20 of the 1934 Act<sup>6</sup>, (3) have committed common law fraud, (4) have breached their contract with Plaintiff, (5) have been unjustly enriched, (6) should be suffered to have the Purchase Agreement rescinded, (7) have violated Section 11 of the Act, and (8) have violated Section 15 of the Act.<sup>7</sup>

### III. LEGAL STANDARD

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "In reviewing a 12(b)(6) motion, this Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996); see also Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The complaint need not set out the facts in detail; what is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a); see also La Salvia v. United Dairymen, 804 F.2d 1113, 1116 (9th Cir. 1986). Thus, the Court's task "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998).

---

<sup>6</sup> This claim is asserted against only the Individual Defendants. Compl. ¶ 64.

<sup>7</sup> This claim is asserted against only the Individual Defendants. Compl. ¶ 101.

1 **IV. DISCUSSION**

2 A. First Claim: Violation of Section 10(b) of the Act and  
3 Rule 10b-5 Against All Defendants

4 Plaintiff contends that Defendants, having access to  
5 accurate inside information, knowingly made false statements about  
6 internal controls and revenue recognition in its SEC filings.  
7 Compl. ¶ 52. Also, Individual Defendant Tripathi "reaped nearly  
8 \$2 million from insider sales of Tripathi shares during the second  
9 quarter of 2004 - the very period in which he participated in the  
10 scheme." Pl's. Mem. at 6. Individual Defendant Eichler "sold  
11 50,000 Tripath shares on August 30, 2004, almost two months prior  
12 to [Tripath's] revelation of its improperly reported second  
13 quarter revenues, and just prior to his resignation and the  
14 resignation of Tripath's auditors." Id. at 8.

15 Defendants contend that Plaintiff has not met the heightened  
16 pleading requirements under Rule 9(b) and the Private Securities  
17 Litigation Reform Act ("PSLRA"). Defendants' Memorandum in  
18 Support of Motion to Dismiss at 8 ("Defs'. Mem."). Specifically,  
19 Defendants contend that "Plaintiff does nothing more than point to  
20 Tripath's [October] 2005 announcements that it restated results  
21 for the second quarter of fiscal 2004 - originally announced on  
22 August 5-6, 2004." Id.

23 Section 10(b) of the Act, codified at 15 U.S.C. § 78j(b),  
24 makes it unlawful for any person to use or employ "any  
25 manipulative or deceptive device or contrivance" in violation of  
26 the SEC rules and regulations. SEC Rule 10b-5, promulgated under  
27 the authority of 10(b), makes it unlawful for any person to "make  
28

1 untrue any statement of a material fact or to omit to state a  
2 material fact necessary in order to make the statements made, in  
3 light of the circumstances under which they were made, not  
4 misleading." Rule 10b-5 also makes it unlawful for any person to  
5 "engage in any act, practice or course of business which operates  
6 or would operate as a fraud or deceit upon any person, in  
7 connection with the purchase or sale of any security."

8 However straightforward the law and regulation may seem,  
9 pleading securities claims under them is a difficult task. First,  
10 such claims are subject to the heightened pleading requirements of  
11 Rule 9(b). "Rule 9(b) requires the inclusion of specific facts  
12 regarding the alleged fraudulent activity, such as the time, date,  
13 places, content of each fraudulent representation, the reasons  
14 that the representation is false, and the identity of the person  
15 or persons engaged in the fraud." In re Autodesk, Inc. Securities  
16 Litigation, 132 F. Supp. 2d 833, 840 (N.D. Cal. 2000), citing In  
17 re GlenFed Securities Litigation, 42 F.3d 1541, 1547-1549 (9th  
18 Cir. 1994). "The PSLRA added the requirement that the plaintiff  
19 specify each statement alleged to have been misleading and the  
20 reason or reasons why the statement is misleading." Id.

21 Second, a plaintiff must satisfy the requirements of the  
22 PSLRA, pleading scienter, falsity, and loss causation with  
23 particularity in order state a claim.<sup>8</sup>

---

24  
25 <sup>8</sup> A fuller description is: "The basic elements of a Rule 10b-  
26 5 claim...are (1) a material misrepresentation or omission of fact,  
27 (2) scienter, (3) a connection with the purchase or sale of a  
28 security, (4) transaction and loss causation, and (5) economic  
loss." In re Daou Systems, Inc., 411 F.3d 1006, 1014 (9th Cir.  
2005) citing Dura Pharmaceuticals, Inc. v. Broudo, 125 S.Ct. 1627,

1                   1.    Scienter and Falsity<sup>9</sup>

2           To establish scienter, a plaintiff "must plead particular  
3 facts giving rise to a strong inference of deliberate  
4 recklessness." In re Silicon Graphics, Inc. Securities  
5 Litigation, 183 F.3d 970, 979 (9th Cir. 1999). "[R]ecklessness in  
6 the § 10(b) context is, in the words of the Supreme Court, a form  
7 of intentional conduct." Id. at 977 (citation removed). The  
8 facts must demonstrate intent rather than mere motive and  
9 opportunity. Id. at 974. "The stricter standard for pleading  
10 scienter naturally results in a stricter standard for pleading  
11 falsity, because falsity and scienter in private securities fraud  
12 cases are generally strongly inferred from the same set of facts  
13 and the two requirements may be combined into a unitary inquiry  
14 under the PSLRA." In re Daou Systems, Inc., 411 F.3d 1006, 1015  
15 (9th Cir. 2005). A Court will consider whether the "total of  
16 plaintiffs' allegations, even though individually lacking, are  
17 sufficient to create a strong inference that defendants acted with  
18 deliberate or conscious recklessness." Id. at 1022 (citation  
19 removed).

20           Plaintiff puts forth three sets of allegations in pleading  
21 scienter. First, Plaintiff alleges that Tripath violated

22 \_\_\_\_\_  
23 1631 (2005). Even if these elements are properly pled, the PSLRA  
24 "carves out a safe harbor from liability if the statements at issue  
25 were forward-looking and accompanied by meaningful risk warnings."  
In re Cooper Mountain Securities Litigation, 311 F. Supp. 2d 857,  
866 (N.D. Cal. 2004).

26           <sup>9</sup> Because the Court dismisses this claim for its failure to  
27 meet the heightened pleading standards of PSLRA, it is unnecessary  
28 for the Court to examine whether it meets the standards of FRCP  
9(b).

1 Generally Accepted Accounting Principles ("GAAP") by recognizing  
2 revenue "from sales that never occurred." Pl's. Mem. at 7.  
3 Second, Plaintiff alleges that the Individual Defendants sold  
4 Tripath shares during the relevant period. Id. at 8. Individual  
5 Defendant Tripathi "reaped nearly \$2 million in proceeds" and  
6 Individual Defendant Eichler "sold 50,000 Tripath shares...two  
7 months prior to [Tripath's] revelation of its improperly reported  
8 second quarter revenues." Id. Third, Plaintiff contends that  
9 Defendants misrepresented the development and sales status of its  
10 "Godzilla" product. Id. at 7.

11 (a.) Violations of GAAP

12 Plaintiff contends that the overstatement made in violation  
13 of GAAP "amounted to approximately 30% of Tripath's revenues for  
14 the second quarter 2004 - revealing an overstatement of  
15 significant magnitude that was not minor or technical in nature."  
16 Id. "Violations of GAAP standards can [] provide evidence of  
17 scienter." In re Daou Systems, Inc., 411 F.3d 1006, 1016 (9th  
18 Cir. 2005) (citation removed). However, a "general allegation  
19 that the practices at issue resulted in a false report of company  
20 earnings is not a sufficiently particular claim of  
21 misrepresentation." Id. (citation removed). Plaintiffs must  
22 allege sufficient information so that the Court "can discern  
23 whether the alleged GAAP violations were minor or technical in  
24 nature, or whether they constituted widespread and significant  
25 inflation of revenue." In re McKesson HBOC, Inc. Securities  
26 Litigation, 126 F. Supp. 2d 1248, 1273 (N.D. Cal. 2000).

27 Under GAAP, "revenue must be earned before it can be  
28



1 recognized [that is,] the earnings process must be substantially  
2 completed and an exchange must have occurred before revenue can be  
3 recognized." Provenz v. Miller, 102 F.3d 1478, 1484 (9th Cir.  
4 1996).

5 In assessing Plaintiff's claim, Tripath's October 2, 2004  
6 announcement is worth quoting at length:

7 Shipments made to customers during the third quarter are  
8 currently estimated to be between \$1.9 million and \$2.1  
9 million. Tripath is currently reviewing the return of \$1.3  
10 million of product to a distributor in the third quarter.  
11 This product had been shipped to customers by the  
12 distributor, and recognized as revenue by Tripath, in the  
13 quarter ended June 30, 2004. The distributor paid for this  
14 product during the third quarter. The Distributor [sic] will  
15 not return this product to Tripath. Tripath may restate its  
16 revenue for the quarter ended June 30, increase its sales  
17 return reserve for the third quarter, which would reduce net  
18 revenue in the third quarter, or make other adjustments.

19 On January 31, 2005, Tripath's 8-K stated that Tripath's Audit  
20 Committee:

21 concluded that approximately \$1.4 million of [the above-  
22 described sale] did not meet the appropriate recognition  
23 criteria because a former employee of [Tripath] had agreed  
24 that the Distributor could return the product at the  
25 Distributor's discretion...This former employee had on this  
26 occasion agreed to a term of sale that was outside of  
27 [Tripath's] standard practices. This term of sale was not  
28 referenced in the documentation related to the sale submitted  
to [Tripath's] finance department.

While these statements do raise an eyebrow of concern and may  
support an inference, they do not create a strong inference, of  
deliberate recklessness. First, though perhaps sloppy, Tripath's  
sale to the Distributor was "substantially completed." The  
Distributor paid for the product and would "not return this  
product to Tripath," indicating that the earnings process was  
substantially completed and an exchange occurred. Second, the

1 January 31st announcement makes it clear that this perhaps sloppy  
2 accounting was an aberration from Tripath's standard practices,  
3 which is, at its worst, an instance of negligence, rather than, as  
4 the standard requires, an indication of "widespread and  
5 significant inflation of revenue."

6 (b.) Insider Trading by Individual Defendants

7 Plaintiff alleges that the Individual Defendants sold Tripath  
8 shares during the relevant period. Pl's. Mem. at 8. Individual  
9 Defendant Tripathi "reaped nearly \$2 million in proceeds" and  
10 Individual Defendant Eichler "sold 50,000 Tripath shares...two  
11 months prior to [Tripath's] revelation of its improperly reported  
12 second quarter revenues." Id.

13 "Unusual trading or trading at suspicious times or in  
14 suspicious amounts by corporate insiders has long been recognized  
15 as probative of scienter." Greebel v. FTP Software, Inc., 194  
16 F.3d 185, 197 (1st Cir. 1999). However, "the trading must be in a  
17 context where defendants have incentives to withhold material,  
18 non-public information, and it must be unusual, well beyond the  
19 normal patterns of trading by those defendants." Id. at 198.

20 While Plaintiff has alleged that the trading by the  
21 Individual Defendants occurred during an allegedly suspicious  
22 time, it has not alleged that such trading was unusual for those  
23 Individual Defendants. Bare-bones allegations that Defendants  
24 were "privy to non-public information concerning its business  
25 [and] finances" and therefore the "Individual Defendants knew or  
26 recklessly disregarded the fact that adverse facts...had not been  
27 disclosed to, and were being concealed from, the investing  
28

1 public," Compl. at ¶¶ 8-9, do not suffice as pleading facts with  
2 such particularity as to give rise to a strong inference of  
3 reckless disregard.

4 (c.) Godzilla

5 On March 9, 2004, Tripath stated in its 10-K that it  
6 "announced our first four amplifier devices based on the new  
7 Godzilla, CMOS process and we are currently sampling these devices  
8 with various customers." Compl. ¶ 25. In July 2004, Tripath  
9 stated in its Form 8-K that it believed that it was "making good  
10 progress in securing additional design wins...based on feedback  
11 from various major...OEMS as well as in securing design wins with  
12 automotive OEMS for in-dash units." Id. ¶ 28. On March 24, 2005,  
13 Defendants stated in an SEC filing, that it had "introduced our  
14 lower cost 'Godzilla' architecture products in January 2004 and  
15 began sampling them in certain customers' products in mid-2004.  
16 However, we have not received design-wins for these products to  
17 date." Compl. ¶ 34.

18 The Court finds no plausible misrepresentation here. It  
19 simply doesn't make sense that Tripath deceived others when it  
20 stated in its March 2004 10-K that Tripath was sampling this  
21 product with various customers and then announced in July 2004  
22 that it was making progress in securing "additional design  
23 wins...based on feedback." It does not state a claim for  
24 misrepresentation by showing that Tripath gave a general statement  
25 about a developing product and then, a few months later, said that  
26 good progress was being made and feedback was sent to Tripath  
27 regarding the sampling.

1 In sum, Plaintiff has not met the high pleading standard for  
2 scienter, even considering all allegations together. The Court  
3 finds that no sufficient basis exists to create a strong inference  
4 that the Defendants acted with deliberate recklessness.

5 2. Loss Causation

6 To establish loss causation, the PSLRA "expressly imposes on  
7 plaintiffs the burden of proving that the defendant's  
8 misrepresentations caused the loss for which the plaintiff seeks  
9 to recover." Dura Pharmaceuticals, Inc., 125 S.Ct. at 1633,  
10 quoting § 78u-4(b)(4).

11 Because the Court finds that Plaintiff has not properly pled  
12 a misrepresentation under the heightened pleading standard, the  
13 Court finds that Plaintiff cannot properly plead loss causation.

14 Based on the foregoing, the Court finds that Plaintiff has  
15 not properly pled a violation of Section 10(b) and Rule 10(b)-5.  
16 Accordingly, the Court GRANTS Defendants' motion and DISMISSES  
17 Plaintiff's claim.

18 B. Second Claim: Control Person Liability under Section 20  
19 of the Act

20 Plaintiff alleges that the Individual Defendants, in their  
21 official capacities as Board members and corporate officers, "were  
22 in a position of power and authority to cause Tripath to engage in  
23 the wrongful acts complained of," thereby incurring liability  
24 under Section 20 of the Act. Compl. ¶¶ 64-65.

25 Defendants contend that because Plaintiff has failed to  
26 adequately plead a primary violation of Section 10(b), Plaintiff  
27 cannot plead control person liability under Section 20.

To be liable under Section 20(a) of the 1934 Act, plaintiffs must be liable under another section of the Act. See Heliotrope General, Inc. v. Ford Motor Co., 189 F.3d 971, 978 (9th Cir. 1999); 15 U.S.C. § 78t(a).<sup>10</sup>

Because Plaintiff has not established that Defendants are liable under another section of the 1934 Act, Plaintiff cannot state a claim under Section 20.

Accordingly, the Court GRANTS Plaintiff's motion and DISMISSES Plaintiff's claim under Section 20.

C. Third Claim: Fraud

Plaintiff contends that it relied on Tripath's false representations in deciding to purchase Tripath securities. Compl. ¶ 69.<sup>11</sup>

Defendants contend that Plaintiff has not pled the claim of

---

<sup>10</sup> Section 11 of the 1934 Act does not qualify as a "provision of this title [the 1933 Act] or of any rule or regulation thereunder." 15 U.S.C. § 78t(a).

<sup>11</sup> Plaintiff brings both state and federal claims. Because the Purchase Agreement does not specify which state law applies to the contract, the Court must decide which state law applies.

If an action is transferred to another federal district, the receiving district must apply the choice of rules of the original forum state. See Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

As the receiving Federal District, this Court must apply the choice of law rules of New York State.

New York State Courts use the "grouping of contracts" or "center of gravity" theory, which "gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of (the) particular litigation.'" Auten v. Auten, 308 N.Y. 155, 160-161 (N.Y. 1954).

The Court finds that New York law should be applied because the contract was signed in New York, the Plaintiff resides there, and the parties knew that the effects of the contract would be felt in New York.

1 fraud with particularity as required by FRCP 9(b). Defs'. Mem. at  
2 21.

3 Plaintiff has stated specific facts about who committed the  
4 alleged fraud (the Individual Defendants and Tripath), the content  
5 of the allegedly false representation (violations of GAAP), why it  
6 is a false representation (failure to inform investors of relevant  
7 information), and the identity of the persons engaged in the fraud  
8 (the Individual Defendants and Tripath).

9 Because this claim is adequately pled, the Court DENIES  
10 Defendants' motion to dismiss this claim for fraud.

11 D. Fourth Claim: Breach of Contract and Rescission

12 Plaintiff contends that Tripath violated Paragraph (d) of the  
13 Purchase Agreement, thereby breaching the contract.

14 Defendants contend that the Complaint fails to state what act  
15 by Tripath constituted a violation of Paragraph (d). "Paragraph  
16 (d) is a warranty that, as of the time the agreement was signed,  
17 there had been no material changes in the covered areas. And  
18 nowhere in the Complaint does Plaintiff allege that one of the  
19 material changes warranted against had occurred as of August 2,  
20 2004." Defs.' Mem. at 22.

21 Paragraph (d) of the Purchase Agreement, in relevant part,  
22 states that "[s]ince the date of the last audited financial  
23 statements included within the SEC Reports...there has been no  
24 event, occurrence or development that has had or that could  
25 reasonably be expected to result in a material adverse effect on  
26 the Company's operations or business prospects." Declaration of  
27 Sarah A. Good in Support of Motion to Dismiss ("Good Decl."), Ex.

1 at 2. Paragraph (d) also asserts that Tripath has not incurred any liabilities<sup>12</sup>, that Tripath has not altered its method of accounting, that Tripath has not declared or made any dividend or distribution, and that it has not issued any equity securities to any officer or director, except pursuant to existing Tripath stock options plans. Id.

Plaintiff has stated a claim for breach of contract. In addition to alleged violations of Paragraph (d), Plaintiff incorporates by reference all preceding allegations, thereby bringing the alleged misrepresentations and omissions into play. By alleging these facts, Plaintiff has properly alleged that Defendants breached the Purchase Agreement by failing to disclose relevant information.

Accordingly, the Court DENIES Defendants' motion to dismiss this claim for breach of contract.

E. Fifth Claim: Unjust Enrichment and Money Had and Received

Plaintiff alleges that Defendants have been unjustly enriched by the \$2,000,000 Plaintiff paid to Tripath. Compl. ¶¶ 79-85. Plaintiff contends that Tripath should restore this money to Plaintiff. Id. ¶ 85.

Defendants contend that a plaintiff cannot bring a claim for unjust enrichment because the Purchase Agreement is a valid and enforceable contract.

---

<sup>12</sup> "...other than trade payables and accrued expenses incurred in the ordinary course of business consistent with past practice and liabilities [] not required to be reflected in the Company's financial statements." Good Decl. at 2.

1 "Under both California and New York law...an action in quasi-  
2 contract...does not lie when an enforceable, binding agreement  
3 exists defining the rights of the parties." Paracor Finance, Inc.  
4 v. General Electric Capital Corp., 96 F.3d 1151, 1167 (9th Cir.  
5 1996).

6 It is not legally feasible for Plaintiff to bring these  
7 claims. The existence of the Purchase Agreement, a valid,  
8 enforceable contract defining the rights of the parties,  
9 forecloses the possibility of bringing a quasi-contract claim,  
10 such as these for unjust enrichment and money had and received.

11 The Court GRANTS Defendants' motion and DISMISSES Plaintiff's  
12 claims for unjust enrichment and money had and received.

13 F. Sixth Claim: Rescission

14 Plaintiff alleges that had it known about Tripath's  
15 misrepresentations, it would not have entered into the Purchase  
16 Agreement. Compl. ¶ 91. Tripath's conduct, moreover, operated as  
17 a fraud and deceit upon Plaintiff, depriving it of properly or  
18 legal rights or otherwise causing injury. Id. ¶ 92. Because of  
19 these facts, Plaintiff contends that it is entitled to rescission  
20 of the Purchase Agreement and "other agreements." Id. ¶ 93.

21 Defendants contend that because Plaintiff no longer has  
22 Tripath stock, the parties cannot, as required by rescission, be  
23 returned to status quo ante. Defs'. Mem. at 24.

24 When a Court rescinds an agreement, it has a duty to place  
25 the parties where they were before the contract was made. See  
26 Vitale v. Coyne Realty, Inc., 414 N.Y.S.2d 388 (N.Y.A.D. 1979). A  
27 suit to rescind a contract will not lie where the parties cannot  
28



1 be restored to status quo ante. See Slater v. Slater, 240 N.Y.  
2 557 (N.Y. 1925). However, the "terms upon which rescission may be  
3 granted where complete restoration of the parties to their former  
4 position is impossible rests in the sound discretion of the trial  
5 court." Buffalo Builders' Supply Co. v. Reeb, 247 N.Y. 170, 176  
6 (N.Y. 1928).

7 Even though the specific restoration of Tripath stock cannot  
8 be returned to Tripath, its value, if Plaintiff prevails, may be.  
9 Accordingly, the Court DENIES Defendants' motion.

10 On final note, Plaintiff asks for rescission of "other  
11 agreements." Plaintiff has not specified what other agreements  
12 these are, how these other agreements relate to this case, nor has  
13 Plaintiff disclosed their subject matter or terms. Without more,  
14 the Court cannot determine the legal feasibility of this  
15 contention based on these facts.

16 G. Seventh Claim: Section 11 of the 1933 Act

17 Plaintiff contends that because Defendants used improper  
18 accounting methods and had inadequate internal accounting  
19 controls, "Defendants lacked a reasonable basis for their  
20 statements regarding Tripath." Compl. ¶ 96. Plaintiff was  
21 therefore injured when it purchased Tripath stock because it  
22 relied on the registration statements and supplements based on  
23 these misrepresentations and failures. Compl. ¶¶ 95-98.

24 Defendants challenge this claim on the same basis as it  
25 challenged Plaintiff's claim under Section 10(b). Defs'. Mem. at  
26 20. Specifically, Defendants ask the Court to dismiss this claim  
27 because it fails to meet the heightened pleading requirements of  
28

1 FRCP 9(b).

2 Section 11 of the 1933 Act imposes civil liability on those  
3 who file a false registration statement. See 15 U.S.C. § 77k.  
4 Though not subject to the heightened pleading standards of PSLRA,  
5 Section 11 must still be plead with particularity under FRCP 9(b).  
6 See Falkowski v. Imation Corporation, 309 F.3d 1123, 1133 (9th  
7 Cir. 1996), amended by Falkowski v. Imation Corporation 320 F.3d  
8 905 (9th Cir. 2003). "To survive dismissal, plaintiffs must  
9 demonstrate, with particularity, (1) that the registration  
10 statement contained an omission or misrepresentation, and (2) that  
11 the omission or misrepresentation was material, that is, it would  
12 have misled a reasonable investor about the nature of his or her  
13 investment." In re Daou Sytems, Inc., 411 F.3d at 1028 (citation  
14 omitted). It is important to note that "[n]o scienter is required  
15 for liability under § 11; defendants will be liable for innocent  
16 or negligent material misstatements or omissions." Id. at 1027  
17 (citations and quotation marks removed).

18 Plaintiff has plead with particularity a claim under Section  
19 11. Specifically, as shown in the facts stated above for fraud,  
20 Plaintiff has stated specific facts that the registration  
21 statements allegedly omitted material facts about accounting  
22 methods and product development. Accordingly, the Court DENIES  
23 Defendants' motion.

24 H. Section 15 of the 1933 Act Against Individual Defendants

25 Plaintiff contends that because the Individual Defendants  
26 "acted as a controlling person of Tripath within the meaning of  
27 § 15," they were in a position to "cause Tripath to engage in the  
28

wrongful acts complained of herein." Compl. ¶¶ 101-102.

Defendants contend that because Langley has failed to state a claim under Section 11, it cannot state a claim under Section 15. Defs.' Mem. at 20.

Section 15(a) of the 1933 Act "imposes joint and several liability upon every person who controls any person liable under sections 11 or 12." In re Daou Systems, 411 F.3d at 1029, quoting 15 U.S.C. § 77o.

Because the Court has determined that Plaintiff stated a claim under Section 11, it can bring a claim under Section 15(a). Accordingly, the Court DENIES Defendants' motion to dismiss this claim.

**V. CONCLUSION**

The Court GRANTS Defendants' motion as to three of the eight claims. Accordingly, the Court DISMISSES Plaintiff's claims for violations of § 10(b), violations of § 20, and unjust enrichment and money had and received.

The Court GRANTS Plaintiff thirty days from the date of this Order to amend the Complaint. If Plaintiff fails to amend its claims by that date, the Court will consider these claims waived and therefore the Court will bar Plaintiff from bringing these claims.

IT IS SO ORDERED.

Dated: March 7, 2006

  
UNITED STATES DISTRICT JUDGE